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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 IN RE: MIDLAND CREDIT  
11 MANAGEMENT, INC.,  
12 TELEPHONE CONSUMER  
13 PROTECTION ACT LITIGATION  
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Case No.: 11md2286-MMA-MDD

ORDER:

(1) DENYING PLAINTIFFS' MOTION  
TO AMEND SCHEDULING ORDER;  
[ECF No. 801]

(2) DENYING JOINT MOTION  
REGARDING PLAINTIFFS'  
REQUEST FOR LEAVE TO TAKE  
DEPOSITIONS; AND  
[ECF No. 803]

(3) DENYING JOINT MOTION FOR  
LEAVE TO TAKE DEPOSITION AND  
DISCOVERY OF NOBLE SYSTEMS  
[ECF No. 790]

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23 Before the Court is the motion of certain member Plaintiffs, filed on  
24 July 15, 2020, to amend the scheduling order in this multi-district litigation  
25 (MDL).<sup>1</sup> (ECF No. 801). Defendants Midland Funding LLC, Midland Credit  
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27 <sup>1</sup> The list of Plaintiffs bringing and joining in this motion can be found at ECF No. 801 at 3-6.

1 Management, Inc. and Encore Capital Group, Inc. (collectively “Defendants”)  
2 responded in opposition on July 30, 2020. (ECF No. 809). As provided below,  
3 the motion to amend the scheduling order is **DENIED**. The resolution of this  
4 motion also resolves Plaintiffs’ motion for leave to take depositions (ECF  
5 803), and Plaintiff Ashok Arora’s motion for leave to obtain discovery and  
6 take depositions. (ECF No. 790).

### 7 BACKGROUND

8 This MDL originated in 2011. Defendants are alleged to have violated  
9 the Telephone Consumer Protection Act (TCPA). (ECF No. 1). The MDL was  
10 initially comprised of four member actions, all purported class actions. As of  
11 January 2018, there were roughly 264 actions. The first consolidated  
12 complaint was filed on July 11, 2012. (ECF No. 23). The Court approved the  
13 settlement of this class action, alleging calls prior to September 1, 2014, on  
14 December 2, 2016. (ECF No. 434). Only eight member cases resolved in the  
15 settlement of this first class action. A second class action involving calls after  
16 September 1, 2014, was commenced with the filing of an amended  
17 consolidated complaint on October 20, 2017. (ECF No. 538). That complaint  
18 was dismissed without prejudice on July 2, 2020, following a settlement with  
19 the Plaintiff representing the class. (ECF No. 795). Remaining in the MDL  
20 are dozens of individual cases with Plaintiffs who opted out of the first class  
21 settlement and who were prospective class members in the second class.

22 Defendants answered the amended consolidated complaint on  
23 December 8, 2017. (ECF No. 549). On January 30, 2018, the Court ordered  
24 Defendants to file a responsive pleading in all cases so that discovery could  
25 commence. (ECF No. 562). On April 25, 2018, an initial case management  
26 conference was held on all remaining cases. (ECF No. 587). Following the  
27 case management conference, the Court ordered the parties to complete the

conference required by Rule 26(f), Fed. R. Civ. P., and file a joint discovery plan. A further case management conference was conducted on July 23, 2018. (ECF No. 602). As contemplated in the case management conference, on August 10, 2018, the parties filed a joint motion to implement a plaintiff questionnaire, a protective order, and to provide for certain preliminary discovery. (ECF No. 603). On August 15, 2018, the Court issued an order requiring any Plaintiff objecting to the proposed discovery procedure file objections by August 27, 2018. (ECF No. 604). No objections were filed.

On September 5, 2018, the Court issued an order implementing the questionnaire process. (ECF No. 608). The order, among other things, required Defendants to make available to plaintiffs who completed the required questionnaire:

a. Non-privileged documents sufficient to show the dialing technology Defendants used to make debt-collection calls during the time periods in which the plaintiffs in this MDL were called by Midland, as reflected by the Plaintiff Questionnaire responses and the call records produced by Defendants (the “Relevant Time Periods”).

b. Non-privileged documents sufficient to show Defendants’ internal policies and procedures relating to debt-collection calls during the Relevant Time Periods, including materials used to train employees responsible for placing calls during the Relevant Time Periods.

c. A description of the technological systems, including both hardware and software, that Midland used to contact consumers by telephone during the Relevant Time Period, including, to the extent readily available:

- i. The model and manufacturer of all hardware devices used;
- ii. The name and developer of each software program used by Midland, whether such programs were purchased from a third-party vendor, customized for Midland in conjunction with a third-party vendor, or developed internally;
- iii. The purpose or function of each such device or software program;
- iv. How Midland’s employees or agents operate such devices and software programs; and
- v. The dates such devices and software programs were in use at

1 Midland.

2 d. A description of how the technological systems described in  
3 response to item (c) above are used to place calls to individual consumers.

4 September 2018 Order, ¶ C.1 (ECF No. 608 at 5-6).<sup>2</sup>

5 On June 4, 2019, the Court ordered the parties to file a status report  
6 confirming that the questionnaire discovery process was complete and  
7 requiring the parties to meet and confer regarding the next phase of  
8 discovery including deposing Defendants, deposing certain Plaintiffs and to  
9 provide a new joint discovery plan. The Court also ordered the parties to  
10 propose deadlines for the filing of any summary judgment motions and any  
11 motions for class certification. (ECF No. 689).

12 Following receipt of the status reports, including reports from some of  
13 the Plaintiffs bringing this motion, the Court issued an order setting  
14 discovery parameters and deadlines. In the order, filed on September 4,  
15 2019, the Court set deadlines for the deposition of the lead Plaintiff in the  
16 proposed class action, the deposition of Defendants under Rule 30(b)(6), Fed.  
17 R. Civ. P., regarding calling technologies and practices after September 1,  
18 2014, and the issuance of certain third-party subpoenas to cellular carriers by  
19 individual Plaintiffs. The Court also ordered the parties to meet and confer  
20 regarding other depositions pertinent to the post-September 1, 2014  
21 Plaintiffs, and any proposed depositions and disputes regarding pre-  
22 September 2014 Plaintiffs. The Court required that any summary judgment  
23 motion and any motion for class certification be filed no later than January  
24 24, 2020. (ECF No. 702).

25 In the September 4, 2019 order, the Court acknowledged that it did not

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27 <sup>2</sup> The Court will refer to pagination supplied by CM/ECF rather than original pagination throughout.

1 provide for dispute resolution regarding any issues raised regarding the  
 2 discovery provided by Defendants in connection with the questionnaire  
 3 process. To address that shortcoming, the Court ordered Defendants to file a  
 4 report identifying all remaining cases alleging calls prior to September 1,  
 5 2014; designating attorneys responsible for responding to individual  
 6 Plaintiffs regarding discovery issues and potential settlement; and  
 7 designating attorneys responsible for responding to individual Plaintiffs  
 8 regarding issues with the plaintiff-specific discovery provided by Defendants  
 9 in connection with the questionnaire process. The Court provided a deadline  
 10 to bring any discovery dispute stemming from the questionnaire process to  
 11 the Court no later than December 2, 2019. The Court also ordered the  
 12 relevant parties to meet and confer regarding a deposition of Defendants  
 13 regarding calling technologies and practices prior to September 1, 2014. (*Id.*).

14 On December 16, 2019, following the submission of status reports and  
 15 motions, the Court issued two orders regarding discovery. The first order  
 16 involved a motion by two of the individual Plaintiffs who also brought the  
 17 instant motion, Nicholas Martin and Jeremy Johnson, to take the deposition  
 18 of Defendants regarding calling practices and technologies in place prior to  
 19 September 1, 2014. (ECF No. 713). The Court granted the motion and  
 20 allowed for the deposition to proceed no later than January 31, 2020.<sup>3</sup> (ECF  
 21 No. 725). The deposition was taken on January 28, 2020. (*See* ECF No. 803  
 22 at 5).

23 The second motion was a joint motion by counsel for lead Plaintiff and  
 24 Defendants to allow for the deposition of third party Alfred Collins, the  
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26 <sup>3</sup> To proceed with the deposition, counsel had to provide a means for all interested  
 27 Plaintiffs and counsel to attend the deposition either in person or by remote means and to  
 have the ability to suggest questions to counsel taking the deposition.

1 deposition of third party Noble Systems and the deposition of Defendants  
2 regarding calling technologies and practices for calls made prior to September  
3 4, 2014. (ECF No. 715). The motion was instigated by the request of 14  
4 individual Plaintiffs, made through lead counsel, for those depositions. (*Id.*).  
5 That motion also was granted and provided that the deposition of Defendants  
6 proceed as provided in the Court's order on the motion brought by Plaintiffs  
7 Martin and Johnson. The Court also ordered that the deposition of Noble  
8 Systems occur no later than January 31, 2020, and the deposition of Mr.  
9 Collins occur no later than February 14, 2020. The Court extended certain  
10 expert discovery deadlines and provided that "any motion for class  
11 certification and any motion for summary judgment must be filed no later  
12 than June 12, 2020." (ECF No. 726). No motion was filed for class  
13 certification and no motion was filed by any party for summary judgment.  
14 No motion to extend the time to file any such motion was brought by any  
15 party. The depositions of Noble Systems and Mr. Collins did not proceed and  
16 no party asked that the dates for those depositions be extended.

17 On March 24, 2020, Plaintiffs Martin and Johnson and Defendants filed  
18 a joint motion presenting their agreement that certain requests for written  
19 discovery be served upon Defendants. Defendants agreed to accept service  
20 and agreed to respond to the requests, reserving their rights to object under  
21 the Federal Rules of Civil Procedure. (ECF No. 773). The Court accepted the  
22 agreement on April 27, 2020. (ECF No. 776).

23 On June 29, 2020, a status conference was held regarding the possible  
24 remand of the cases remaining in the MDL. (ECF No. 789). Following the  
25 conference, the Court issued an order requiring that any discovery dispute  
26 regarding the April 27, 2020 discovery order be brought to the Court's  
27 attention on or before July 15, 2020, and that any request for additional



1 discovery also must be filed on or before July 15, 2020. (ECF No. 793).

2 The instant motion, brought by a collection of Plaintiffs, including  
3 Messrs. Martin and Johnson, seeks amendment of the scheduling order.

#### 4 LEGAL STANDARD

5 A scheduling order “may be modified only for good cause and with the  
6 judge’s consent.” Fed. R. Civ. P. 16(b)(4). *Johnson v. Mammoth Recreations,*  
7 *Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “[T]he focus of the inquiry is upon  
8 the moving party’s reasons for seeking modification.... If that party was not  
9 diligent, the inquiry should end.” *Id.* (citation omitted). In addition to being  
10 required to establish good cause, a party moving to extend time after a  
11 scheduling order deadline has passed must demonstrate excusable neglect.  
12 *LaNier v. United States*, No. 15cv0360-BAS-BLM, 2017 WL 951040 at \*2  
13 (S.D. Cal. Mar. 10, 2017).

#### 14 DISCUSSION

15 Plaintiffs’ motion seeks to extend fact discovery, expert discovery,  
16 *Daubert* motions and dispositive motions. Plaintiffs explain that they labored  
17 under a misunderstanding regarding the deadline imposed by the Court to  
18 file “any” summary judgment motions in its December 16, 2019 Order. (ECF  
19 No 726). Plaintiffs believed that the deadline only applied to the class action.  
20 Plaintiffs fail to acknowledge that the Order was predicated by the request of  
21 14 individual Plaintiffs to depose third parties Noble Systems and Alfred  
22 Collins, and to depose Defendants regarding calling practices and procedures  
23 pre-September 1, 2014. The latter request was duplicated by some of the  
24 Plaintiffs in the instant motion and was addressed in two separate Orders on  
25 December 16, 2019. (ECF Nos. 725, 726). The motion leading to the Order  
26 docketed as ECF No. 726 was brought by lead Plaintiff’s counsel and  
27 Defendants as required by the September 4, 2019 Order, which required the

1 parties to meet and confer regarding additional common discovery requested  
2 by *any* Plaintiff. (ECF No. 702). For these Plaintiffs to assert now that they  
3 assumed the Order only related to the class action is disingenuous.

4 Plaintiffs' argument for relief, predicated as it is on their misreading of  
5 the Court's Order, goes only to the issue of whether the summary judgment  
6 deadline should be extended. Regarding extension of discovery deadlines, no  
7 confusion exists. In any event, arguing that Plaintiffs misunderstood  
8 whether the discovery deadlines applied to them would also be disingenuous  
9 for three reasons. First, Plaintiffs were aware of and took advantage of the  
10 opportunity to move for additional discovery. (ECF No. 725) (granting motion  
11 for additional discovery). Second, Plaintiffs had to be aware that the motion  
12 to depose Noble Systems and Mr. Collins was made on behalf of 14 individual  
13 Plaintiffs. Finally, Plaintiffs had to be aware that any Plaintiff could object  
14 to the questionnaire procedure and, later, bring any disputes regarding the  
15 discovery provided by Defendants pursuant to the questionnaire process to  
16 the Court. The misreading of the summary judgment deadline has no  
17 bearing on the question of whether the Court should amend the schedule to  
18 allow for additional fact discovery. Plaintiffs can find no solace in the fact  
19 that the Court accepted the agreement of Plaintiffs and Defendants  
20 regarding service of written discovery in April 2020. Defendants chose not to  
21 oppose and agreed to respond to the discovery. The Court accepted the  
22 agreement but did not rule that the discovery was appropriate or timely.  
23 Those issues were not presented.

24 The Court finds that Plaintiffs were not diligent in pursuing fact or  
25 expert discovery, in seeking extensions of deadlines or in seeking clarification  
26 of the Court's Orders regarding discovery. Accordingly, their motion to  
27 amend the schedule to allow for additional discovery is **DENIED**.



1 With respect to the summary judgment deadline, Plaintiffs admit that  
 2 they misread the Order. Carelessness and confusion do not equate with good  
 3 cause. “[C]arelessness is not compatible with a finding of diligence and offers  
 4 no reason for a grant of relief.” *Johnson v. Mammoth Recreations, Inc.*, 975  
 5 F.2d at 609. The Court finds that Plaintiffs have not demonstrated good  
 6 cause to extend the summary judgment deadline. Their motion to amend the  
 7 schedule for that purpose also is **DENIED**.

8 Plaintiffs Martin and Johnson separately moved for an Order allowing  
 9 them to depose third parties Noble Systems, Livevox and Alfred Collins,  
 10 certain employees of Defendants and others identified by Mr. Collins. That  
 11 motion was joined by several other Plaintiffs. (ECF No. 803). Plaintiff Ashok  
 12 Arora also moved for an Order allowing for written discovery and the  
 13 deposition of third party Noble Systems. (ECF No. 790). In light of the  
 14 Court’s ruling declining to extend the discovery deadline, these motions are  
 15 **DENIED**.

### 16 CONCLUSION

17 Plaintiffs’ motion to amend the schedule is **DENIED**. (ECF No 801).  
 18 Plaintiffs’ motion for leave to take depositions is **DENIED**. (ECF No. 803).  
 19 Plaintiff Ashok Arora’s motion to leave to take discovery of Noble Systems is  
 20 **DENIED**. (ECF No. 790).

21 **IT IS SO ORDERED.**

22 Dated: August 6, 2020

23   
 24 Hon. Mitchell D. Dembin  
 25 United States Magistrate Judge  
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